JOINT PETITION OF HENG PENG HOO & GOH AH MOY

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[DIVORCE PETITION NO. 47-38-1983]
29 MAY 1988

FAMILY LAW: *Joint petition for divorce - Ancillary relief under ss. 76(1) and 73(3) of the Law Reform (Marriage and Divorce) Act 1976 - Substantial contributions financially and materially - Extent of the contributions joint account - Needs of minor children.*

This is an application by the applicant wife under s. 76 of the Law Reform (Marriage and Divorce) Act 1976 for an order that she be given a half share of the matrimonial home which is registered in the name of the respondent's husband. The application was based on the ground that she had made substantial contributions financially and materially and in other diverse ways towards the well being of the marriage and family for acquiring the matrimonial home.

The respondent's husband disputed the applicant's claim by replying that the property was acquired by him on his sole efforts. However, he conceded that the applicant brought up and looked after their 4 children of the marriage from the time they were born and since acquiring the property they have lived with him in the matrimonial home.

The respondent further affirmed that he had in fact contributed a capital sum of RM10,000 for setting up the applicant's saloon whereby she has become a successful hairdresser and is the sole proprietor of a hairdressing and beauty saloon.

In reply thereof, the applicant contended that she contributed towards the purchase of the property by paying the initial sum and incidental costs and later by paying for its maintenance and renovations. The payments were derived from a joint account, where she claimed that her earnings as a hairdresser were credited into the said account from time to time. The respondent hotly denied the fact and stated that the applicant had never credited any substantial sum into the joint account. In fact, the purpose of the joint account was to enable the applicant to use it to pay for sundry expenses.

During the hearing of the application, both parties were being cross-examined. The applicant admitted earning a net income of RM1000 but denied she owned a dwelling house herself when cross-examined.

Before deciding on the application, the Court made the following observations on the law in respect of s. 76:

(a) In exercising the power under s. 76(1) the Court shall have regard to three factors and subject to them, the Court is directed to incline towards equility of division. The three factors are as follows:

  (i) The extent of the contributions made by each party in money, property or work towards the acquiring of the assets.

  (ii) any debts owing by either party which were contracted for their joint benefit.

  (iii) the needs of the minor children if any, of the marriage.

(b) There are no reported local decisions directly on the issue. The Court further concludes that s. 76 was not modelled entirely on s. 37 of English Matrimonial Proceedings and

Property Act 1970. Therefore, any attempts to apply the English principles based on the provision of the English Act would be misleading and erroneous.

(c) There are 4 reported decisions from Singapore on the issue but the Court is of the view that it would be treacherous to try to discern general trends from a mere handful of cases.

(d) In view thereof, the Court would decide the application solely by considering the section and applying its provision to the facts as the Court finds them therein.

Held:

[1] Looking at the statement of account exhibited; it is clear that between 1976 and 1983, only a small sum of money was maintained in the said account, therefore there is no truth in the applicant's contention that the initial payment for the purchase of the property and incidental costs was taken from the savings credited by her in said joint account.

[2] Applicant also failed to show that she had actually contributed to the subsequent costs of maintenance and renovation of the matrimonial home. She failed to show from the statement, the dates and the amount credited by her to pay for maintenance of the matrimonial home. In fact the Court believed that the joint account was kept for the purpose of paying sundry debts and expenses.

[3] From the meagre income in the early stage of her career, it is unlikely that she could at the early stage of her marriage have contributed towards paying for the initial or incidental costs of the matrimonial home.

[4] Nevertheless, taking the evidence as a whole, the Court is inclined to grant the applicant under s. 76(3) on the ground that the applicant as a wife had rendered her domestic services to the respondent husband and towards the welfare of the family, and as a wife and to the children of the marriage. These are contributions which cannot be quantified in money.

[5] However, in exercising the discretion under s. 76(3) the Court is not ordering the division of the assets, for to do so will be inequitable and cause grave hardship to the respondent. It has stated that the property in question is the only asset acquired by the respondent during marriage and he has continued to pay the housing loan instalments monthly. On the other hand, the applicant is financially well off and also owns another house where she can live comfortably. Therefore in the circumstances the Court made an order for a lump sum payment to be paid by the respondent to the applicant.

[Judgment for applicant a sum of RM10,000 to be paid to the applicant by the respondent.]

Cases referred to:

Gissing v. Gissing [1970] 2 All ER 780
Wachtel v. Wachtel [1973] 1 All ER 892
Kowalczuk v. Kowalzuk [1973] 2 All ER 1042

Legislation referred to:

Divorce and Matrimonial Proceedings Rules 1980, r. 56
Matrimonial Proceedings and Property Act 1970 (UK), s. 37
Law Reform (Marriage and Divorce) Act 1976, s. 76, 76(1) (3) (4)
Women' s Charter (Cap. 353, 1985 Edn.) [Sing], s. 106

Other source referred to:

Halsbury's Statute of England, 3rd Edn., Vol. 40, p. 833

For the applicant - Neoh Lay Choo; M/s. Tan, Yu & Co.
For the respondent - Tan Boon Hee; M/s. Tan Teh & Co.

JUDGMENT

Mohamed Dzaiddin J:

This is an application by Madam Goh Ah Moy, ("the applicant") on a joint petition for divorce (the marriage) having been dissolved by this Court on 11 August 1983 for ancillary relief under r. 56 of the Divorce and Matrimonial Proceedings Rules 1980. She is asking this Court to make an order for division of a piece of property known as Lot 2862 Mukim 15, Jalan Kulim, Seberang Perai Tengah bearing title HS(M) no. 627 together with a dwelling house known as No. 64 Lorong Sepakat Tiga, Taman Bandaraya, Bukit Mertajam ("the said property") under s. 76 of the Law Reform (Marriage and Divorce) Act 1976. In short, she wants a half share of the matrimonial home which is registered in the name of the petitioner husband ("the respondent").

The application is supported by an affidavit affirmed on 31 May 1984 (encl. 9), whereby the applicant deposed that she had made substantial contributions financially and materially and in other diverse ways towards the well being of the marriage and family and for acquiring the said property.

In an affidavit affirmed on 10 January 1985 (encl. 20) the respondent disputed the applicant's claim that she had substantially contributed in acquiring the said property. According to him the said property was bought in 1978 for RM38,000, where he paid a down payment of RM14,000 from the commissions which he earned as an insurance agent between 1976 and 1977. The balance of RM26,000 was borrowed from a bank which he had been repaying by monthly instalments of RM291 per month. There was still an outstanding sum of RM20,000 due to the bank. The respondent, however, conceded that the applicant brought up and looked after their four children of the marriage from the time they were born and since acquiring the said property they have lived with him in the matrimonial home. Further, the respondent stated that the applicant's earnings as a hairdresser during the early years of the marriage was minimal which was only sufficient to pay for her own pocket expenses and occasionally for sundry expenses for the children. It seemed that whatever savings she had from her casual employment as a hairdresser was used to pay for an advance fee for her one month hairdressing course in Bangkok between October and November 1980. Admittedly, the applicant has become a successful hairdresser and is the sole proprietor of a hairdressing and beauty saloon in Bukit Mertajam earning substantial income and having no dependants to support. The respondent claimed that he paid the capital sum of RM10,000 for setting up her saloon, as evinced from some of the receipts exhibited in his affidavit.

Finally, the respondent stated that he had remarried and has three children from his second marriage who are living with him at a rented house in Bukit Mertajam. He is now employed as a travelling salesman with a salary of RM1,100 per month.

The applicant then affirmed a supplementary affidavit (encl. 37) contending that she contributed towards the purchase of the said property by paying the initial sum and incidental costs, and later by paying for its maintenance and renovations. The payments were derived from the joint account kept with the Central Malaysia Finance Berhad, where she claimed that her earnings as a hairdresser were credited into the said account from time to time. This fact was hotly denied by the respondent, who in his subsequent affidavit explained that although they had a joint account in CMFB, all the money credited therein however belonged

to him. The respondent stated that the applicant had never credited any substantial sum into the joint account. The purpose of having a joint account was to enable the applicant to use it to pay for sundry expenses, although in 1975 he used the money from the account to purchase a family car, KC 4747 which they subsequently changed to another car in 1978.

Finally, when the application came up for hearing before me, Mr. Tan Boon Hee for the respondent, made an application to cross-examine the applicant on her affidavits. Questions were asked about her financial position and her thriving business as, a hairdressing saloon proprietor. The applicant admitted earning a net income of RM1,000 per month. She was also asked about another dwelling house at No. 108 Jalan Sepakat, Bukit Mertajam, which Counsel suggested belonged to her and that she paid a down payment of RM48,000. The applicant denied the suggestions and stated that the house belonged to her brother who had it registered in her name because she was granted a bank loan. Her brother had been repaying the bank about RM330 per month. It should also be mentioned here that Miss Neoh, for the applicant, had also cross-examined the respondent on his affidavits.

The Law

Section 76 of the Law Reform (Marriage and Divorce) Act 1976 ("the Act") gives the Court power when granting a divorce or judicial separation, to order the division between parties of any assets acquired by them during the marriage. The section is divided into two parts, one is where the assets were acquired by joint efforts (sub-section (1)) and the other where they were acquired by sole effort by one party to the marriage (sub-section) (3)). The application for a half undivided share of the said property to be transferred to her absolutely plainly comes under sub-section (1). In exercising the power under the sub-section, the Court shall have regard to three factors and subject to them, the Court is directed to incline towards equality of division (sub-section 2). The three considerations are as follows:

a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

b) any debts owing by either party which were contracted for their joint benefit;

c) the needs of the minor children, if any, of the marriage.

From the authorities submitted by both Counsels, there appears to be no reported local decisions directly on the issue before me. However, according to the explanatory statement to the bill, this s. 76 follows generally the principles set out in s. 37 of the English Matrimonial Proceedings and Property Act 1970. After studying s. 37 of the English Act I form the view that our s. 76 cannot be said to be modelled entirely on the English provision. The general note to the section (See *Halsbury's Statute of England*, 3rd Edn., Vol. 40, p. 833) states that section was introduced to clarify in what circumstances, if at all, a contribution by one spouse to the improvement, as opposed to the original acquisition, of property owned by the other or in joint names, confers on the contributor a beneficial interest therein. Section 37 specifically provides that the contribution by one spouse must be substantial. Whereas under our s. 76, one of the considerations for equality of division need only be the extent of the contributions made by each party in money, property or work towards the acquisition of the assets. It also does not require the joint efforts to be substantial. In the light of the above, in my view, any attempt to apply the English principles based on the provisions of their 1970 Act to the present case would be misleading and erroneous. Therefore, cases like *Gissing v. Gissing* [1970] 2 All ER 780; *Wachtel v. Wachtel* [1973] 1 All ER 829 and *Kowalczuk v. Kowalzuk* [1973] 2 All ER 1042 cited by Counsel are inapplicable.

I was also referred by Miss Neoh to an article: "*Division of Matrimonial Property upon Termination of Marriage*" by Leong Wai Kum of the National University of Singapore [1989] 1 MLJ xiii which discussed s. 106 of Singapore's Women's Charter (Cap. 353, 1985 Ed.). From the article, it appears that the Singapore section is similar to our s. 76. On this assumption, the reported decision of the Singapore's Court could be relevant for my consideration, despite, according to the learned writer, there have only been four reported decisions in Singapore. However, after reading them, I agree with his comment that it would be treacherous to try to discern general trends from a mere handful of cases.

Having stated the above, I am left with the task of deciding the present application solely by considering the section and applying its provisions to the facts as I find them therein.

Conclusions:

After considering the opposing affidavits of the parties, their oral testimonies and the submission of Counsels, I come to the following conclusions.

First, I am satisfied that the applicant has failed to show that she had contributed by her joint efforts towards acquiring the said property. She merely contended that she made substantial contribution financially and materially and in other diverse ways towards the well being of the marriage and the family, without any evidence in her affidavit to substantiate this contention. Whatever was deposed by her on this point had been rebutted by the respondent which I accept to be the truth of the matter. It is not disputed that both of them operated a joint account with CMFB, which according to the respondent was used for the purpose of paying sundry debts and expenses. Looking at the statement of account of joint account exhibited, it is clear to me that between 1976 and 1983, only a small sum of money was maintained in the said account. The statement also showed that on 12 January 1978 the account had exceeded RM5,000, where a sum of RM4,550 was withdrawn on 28 January 1978 to purchase a family car. From the statement, there is no truth in the applicant's contention that the initial payment for the purchase of the property and incidental costs was taken from the savings credited by her in the said joint account. Further, it is not disputed that the purchase price of the said property was RM38,000 and that the respondent had obtained a bank loan of RM26,600 leaving an initial sum of RM14,000 which he stated was paid from his own savings and commissions. However, what the applicant chose to dispute was this payment of initial sum of RM14,000 which she contended was paid from the joint savings account. If this were true, then one would see from the statement in the joint account, record of withdrawals of money from time to time in 1978 when the said property was purchased.

Secondly, I am also satisfied that the applicant has failed to show that she has actually contributed to the subsequent costs of maintenance and renovation of the matrimonial home, as contended by her. She seemed to rely on the joint account in CMFB by claiming that she credited her income from her hairdressing job into the said account from time to time and that the respondent used the money from the joint account to pay for the maintenance of the matrimonial home. However, she failed to show from the statement the dates and the amount credited by her. Upon a second look at the statement of account, I find there were several payments being credited into the account. Likewise, withdrawals were also made at diverse times. At any rate, they were not a substantial amount which suggests any payment for the costs of maintenance and renovation. On the whole, I believe the respondent when he stated that the account was kept for the purpose of paying sundry debts and expenses.

Thirdly, from the evidence, the respondent had throughout the marriage given substantial assistance and encouragement to the applicant in pursuing her career as a hairdresser which enable her to be what she is today - the successful proprietor of a hairdressing saloon. I am

satisfied that in the early stage of her career her income was minimal, perhaps just sufficient to pay for her own pocket expenses and occasional sundry expenses for the children. Undoubtedly, it must have been very hard for her to be working as a hairdresser as well as to take care of the children. However, from the meagre income, I feel it is unlikely that she could at the early stage of the marriage or even in 1978 (two years before she went to Bangkok to do her hairdressing course) to have contributed towards paying for the initial or incidental costs of the said property.

Fourthly, it is never disputed that the respondent has been repaying the bank loan for the said property which the applicant had not contributed financially. As for the children, it is a fact that they are under the care of the respondent.

Therefore after considering the entire evidence in this application, I am satisfied that the said property was not jointly acquired by the applicant, but by the sole effort of the respondent. Hence, the application under s. 76(1) of the Act fails.

This leaves me to consider sub-sections (3) and (4) of the Act, i.e. the division of the assets acquired by the sole effort of one party. Miss Neoh has submitted on this provision as an alternative, prayer to the main application. Taking the evidence as a whole, I am inclined to grant the application under sub-section (3). It is common ground that the applicant, first, as a wife must have rendered her domestic services to the husband and towards the welfare of the family. Secondly, as a mother, she had to look after the four children and to bring them up. Obviously, these are contributions which cannot be quantified in money. Although the four children are now grown up and under the custody of the respondent, the fact remains that they were brought up and cared by the applicant. In making any order for the division of any assets under this sub-section, I must be guided by the considerations provided for under sub-section (4), i.e. the extent of the contributions made by the applicant as a wife and mother to the welfare of the family and children of the marriage, although the overriding consideration, must, however, be that the respondent should receive a greater proportion of the assets.

In exercising my discretion under sub-section (3) I am not ordering the division of the assets proportionate to each party's contribution or the sale of the said property and divide up the proceeds accordingly, for to do so will be inequitable and cause grave hardships to the respondent. After all, the property in question is the only asset acquired by him during marriage. It is the only property which the respondent can afford to own, considering his present financial standing. He continues to pay the housing loan instalments monthly. Custody of the children was given to him and they continue to live with him in the said home. On the other hand, the applicant is financially well off, having her own hair dressing saloon and earning, on her own admission, a monthly income of RM1,000. In addition, she owns another house at no. 108 Jalan Sepakat (although denied by her) where she can live comfortably. Therefore, in the circumstances of this case, it is my conclusion that it is more appropriate to make an order for a lump sum payment to be paid by the respondent to the applicant. Thus, bearing in mind the extent of the contributions by the applicant to the welfare of the family by caring the children and looking after the family, a sum of RM10,000 will be a fair assessment of her contributions.

Accordingly, I make an order for the respondent to pay the applicant a sum of RM10,000 and agreed costs of this application of RM2,000.

Also found at [1989] 2 CLJ 833